Supreme Court, U.S.
FILED

No. 01 591 OCT - 9 2001

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In The

Supreme Court of the United States

THOMAS CACCIOLA, et ux., et al.,

Petitioners,

v.

SIMS COMMUNICATIONS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- Does the refusal of the Washington Supreme Court to permit petitioners' appeal in interlocutory orders of July 12, 2001, and June 5, 2001, constitute a final judgment under 28 U.S.C. § 1257(a)?
- Whether the Washington Supreme Court, in dismissing the appeal in this case in accordance with its recent orders enjoining a motion for reconsideration before it in a meritorious case, precluding petitioners' counsel from participating in this case except upon compliance with its orders, imposing sanctions for filing a motion for discretionary review, and levying sanctions for filing a brief in the appeal in conformance with earlier rulings and the rules of appellate procedure, has deprived petitioners of the due process and equal protection of the laws guaranteed by the Fourteenth Amendment?
- Do the recent injunction orders of the Washington Supreme Court, so far as they impose prior restraints on speech, constitute impermissible restraints on First Amendment rights?

PARTIES TO PROCEEDINGS

The following list identifies all parties to the proceedings in the Washington Supreme Court:

Thomas Cacciola & Marlene Cacciola
Peter Vetrano & Lena Vetrano
SIMS Communications, Inc., Mark Bennett, Marvin Berger, James Caprio, Cornelia Eldridge, Ian Hart, Chet Howard, Melvin Leiner, Michael Malet, Darren Marks, George Pursglove

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Thomas and Marlene Cacciola, and Peter and Lena Vetrano, who have withstood the tide of recent orders over the past year in the appeal of a civil case in the Washington courts, respectfully request that a writ of certiorari issue to the Supreme Court of Washington, which refused to permit their appeal in orders barring them from submission of a motion for reconsideration in a meritorious case, preventing their counsel from participating in this case in any of the courts of the state except upon compliance with its orders, approving and imposing sanctions for bringing a motion for discretionary review, and affirming sanctions for submission of a brief in the appeal that conforms with court rulings and the Washington rules of appeal.

OPINIONS BELOW

The July 12, 2001, order of the Washington Supreme Court denying petitioners' motions for a clarification and stay of its June 5, 2001, and March 6, 2001, orders are unreported and are reproduced in the appendix to this petition. (Pet. App. A, 1-3). The June 5, 2001, order of the Washington Supreme Court denying petitioners' motion to modify ruling, and its March 26, 2001, ruling imposing sanctions and denying review are also unreported and are reproduced in Pet. App. A, 4-11. The related January 24, 2001, November 16, 2000, and September 13, 2000, orders and rulings of the Court of Appeals, Division I, State of Washington, are unreported and are reproduced in Pet. App. B, 1-4. The orders of the King County Superior Court are reproduced at Pet. App. C, 1-12.

JURISDICTION

The judgment of the Supreme Court of Washington denying petitioners' motions for a clarification and stay of its orders was entered on July 12, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which reads in relevant part as follows:

> Amendment XIV:
>
> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction. This case arises out of earlier proceedings between Thomas and Marlene Cacciola and Peter and Lena Vetrano against Kochcapital, Inc., other defendants, and Melvin Leiner, James Caprio, and Darren Marks. In September 1995, the latter parties settled with the plaintiffs in an agreement for cash and stock in SIMS Communications, Inc. On October 26, 1995, SIMS issued 55,554 shares of stock to Thomas Cacciola and Peter Vetrano under the agreement. (CP 26, 295-96, 300, 308). The certificates are signed by Mel Leiner as President and by James Caprio as Secretary of the corporation. The certificates have a restrictive legend stating that the shares are restricted as defined in Rule 144, and may not be sold prior to February 10, 1997. (CP 532, 300, 308).

The agreement has the following provisions: 1) plaintiffs are to be provided with the most recent audited financial statements for SIMS and all offering documents for the shares within 14 days of its effective date, 2) all persons signing the agreement in representative capacities warrant that they have full authority to bind their corporations, 3) Washington law and jurisdiction in King County, WA, govern the agreement, and 4) a provision for attorney fees and costs to the party or parties who substantially prevail in proceedings arising out of the agreement. (CP 310-13).

At the time of the agreement, SIMS was selling its securities on the NASDAQ National Market System, and its stock was published in the Wall Street Journal.[1] (CP 321). Initial NASDAQ inclusion requires net tangible assets of $4 million, and continued inclusion requires net assets of $1 million, $2 million if the issuer has had net losses in two of three most recent fiscal years, or $4 million if the issuer has sustained net losses in three of four most recent fiscal years. (CP 376, 323-25).

Post-Settlement Events. In March 1996, SIMS effected a 10 for 1 reverse split of its stock. The closing price the day before the split (3/6/96) was $0.28/shr., and there were 20,188,710 shares of common stock outstanding. On March 7, SIMS opened at $2.34/shr., and had 2,018,871 shares outstanding. (CP 495, 507, 512).

In April 1997, Peter Vetrano began making inquiries about selling his shares. In May 1997, he discovered that his 27,777 shares had been reduced to 2,777 shares through a reverse split in March 1996. (CP 298, 301). Tom Cacciola also states that he discovered the reverse split of his stock at this time. (CP 306). In February 1998, SIMS again split its stock in a 4 for 1 reverse split of company stock. (CP 527). The result is that their shares were converted to less than 700 shares each after the split. They discovered the reverse split of their stock eight or nine months later. (CP 299, 306-07).

Current Action. This case was filed in September 1997. In December 1997, SIMS filed a motion to dismiss and for sanctions on jurisdictional grounds and a failure to state

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[1] A SIMS prospectus dated February 10, 1995, states that the company is approved for listing on the NASDAQ Market. The prospectus also states that the NASD requires, for continued inclusion on NASDAQ, that the company must maintain $2,000,000 in assets, $200,000 market value of the public float, $1,000,000 in net worth and that the bid price of the company's stock be at least $1.00, or alternatively, that the company have a net worth of at least $2,000,000 and that the public float be at least $1,000,000. (CP 376-77).

claims for fraud, breach of fiduciary duty and under RICO. On the jurisdictional issues, SIMS argued that it is not subject to jurisdiction in Washington, that it has never transacted business in the state, and that it does not have minimum contacts with Washington state. (CP 26, 31 & 33-34).

In January 1998, a motion continuing the motion for summary judgment,[2] based on pending discovery, was granted. (Pet. App. C, 11). A briefing of issues in the motion demonstrated that jurisdiction over SIMS theoretically existed in this case. (CP 58, 62-66).

Discovery & Summary Judgment Motions. Written discovery in December 1997, answered in April 1998, and subsequent documents from the Secretary of State, establish that SIMS was doing business in Washington between January 1995 and May 1996, and was renting cellular telephones through Alamo Rent-A-Car. (CP 425, 483). Documents produced included a SIMS prospectus (February 10, 1995), Forms 10K for 1995, 1996 and 1997, and financial statements (6/96, 6/95, 6/93 & 6/92). (CP 1508).

1) *12/98 Summary Judgment Motion.* The 2nd motion for summary judgment was based on similar grounds as the motion to dismiss: a) plaintiffs were given notice of the March 1996 reverse stock split through a stockholders' notice of action; b) the value of their stock was the same before the split as it was after the split based on SIMS' NASDAQ activity showing that on March 6, its stock closed at $.28/shr., and on March 7, traded at $2.34/shr.; c) plaintiffs did not buy securities and did not pay consideration they could recover; d) this was a private agreement between the defendants and plaintiffs, the defendants had no authority to bind SIMS; e) there

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[2] Under Washington Civil Rule 12, the submission of materials outside the pleadings on a motion to dismiss normally converts the motion to a motion for summary judgment. See *Haberman v. WPPS*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987), *appeal dismissed*, 488 U.S. 805 (1988); *Highline Dist. v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

are no acts of fraud that meet the requirements of CR 9; and f) SIMS lacks minimum contacts with Washington state. (CP 1190-04).

The 2nd amended complaint (11/98) alleges that as of September 1995, SIMS was incurring substantial losses, and had losses from its formation in 1991 (As of 9/94, losses of $4,867,000, and as of 9/95, $2 million in additional losses). (CP 344, 373). It is alleged that these facts were not disclosed to plaintiffs when they entered the agreement. (CP 297, 305). The 2nd amended complaint also alleges that their shares were issued in violation of Rule 144, 17 C.F.R. § 230.144, that offering documents and financial statements were not provided under the agreement, and that they were not given notice of the reverse splits of their stock. (CP 284-85).

The motion for summary judgment was denied on December 18, 1998. (Pet. App. C, 9-10; CP 560-61).

2) *Depositions.* The depositions of SIMS CR 30(b)(6) designate (Bruce Schames), James Caprio, Mel Leiner and Darren Marks were taken in October 1998 in Florida (CP 91-106). From the depositions and subsequent discovery, it became clear that the shares received by Tom Cacciola and Peter Vetrano under the settlement agreement could not be traced to a prior owner. The evidence shows that their shares came from SIMS as opposed to shares owned by them. (CP 1024). It was also established that the shares were not executed in brokers' transactions under Section 4(4) of the Securities Act of 1933 or in transactions with a market maker under Section 3(a)(38) of the Securities Exchange Act of 1934.[3]

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[3] In his deposition, Darren Marks was asked how long he had owned the shares that were transferred under the agreement. He answered that he wasn't sure what shares were issued, and that it could have been as far back as 1991, '92, '93, or '94. He also said that the securities were not transferred in brokers transactions or through a market maker in SIMS stock. (CP 942-46). Mel Leiner stated that none of the stock that was

In their depositions, plaintiffs confirmed their understandings of the settlement agreement, and in essence stated that their reasons for entering the agreement were because SIMS is a NASDAQ listed company and was on the board, that it should have assets of about a million dollars, and because they thought the stock would be a liquid asset to have.[4]

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issued came from him, and that he didn't know who the stock came from. (CP 952). Mr. Caprio's testimony was the same. (CP 957-58). In document requests that accompanied the depositions, they were asked to produce all documents showing that the stock was issued in accordance with Rule 144. (CP 960-78). The response was that Rule 144 was not implicated in the transactions with plaintiffs, and that no documents exist as to these requests. (CP 970-78).

In discovery requests sent and answered months later (February and June 1999), the answers state that the shares were owned by Mel Leiner, Darren Marks and James Caprio prior to being transferred to plaintiffs, that the shares were acquired by them when the company was founded, and on documentation of prior ownership, no documents were identified or produced. (CP 990-95, 998-01).

[4] In his deposition, Peter Vetrano stated, "The only information that I know of SIMS . . . is that it was listed on NASDAQ and should have assets of about a . . . million dollars. . . . " "I thought the stock would be a liquid asset to have, and that's the reason . . . I accepted the stock as a settlement." (CP 1456-57). Tom Cacciola was asked if the omissions he was complaining of could be due to lack of information imparted by his counsel. He stated, "No. . . . It would be disclosed to him and he would disclose it to us. . . . " (CP 1447). Previously, he responded correct in answer to a question that your counsel advised you the company was financially stable and secure. The answer was clarified in the deposition where he was asked about statements in his declaration that when he acquired his stock, he believed that SIMS was stable financially and profitable, and to explain the basis for that belief. He answered, "The stock was listed on NASDAQ and was on the board. We figured that it was a stable

In June 1999, plaintiffs filed a motion to obtain the recordings of their depositions pursuant to Civil Rule 26 to authenticate the depositions. (CP 662, 690, 1008). The motion was denied on June 24, 1999. (Pet. App. C, 7-8; CP 695).

3) *6/99 and 7/99 Motions for Summary Judgment and Partial Summary Judgment.* In June 1999, defendants filed a third motion for summary judgment. In this time frame, plaintiffs filed a motion for partial summary judgment under Rule 144 (CP 830). On a hotly disputed record,[5] the former motion was granted in August 1999. The order provides that plaintiffs' complaint against all defendants is dismissed for failure to raise an issue of fact in support of their claims, plaintiffs' complaint against SIMS is dismissed with prejudice for lack of jurisdiction, and

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company and that the company was well stocked in financial assets." He was asked if he thought the opposite is true. "[A]ccording to what we've read, yes, I would say it's not stable. They've had losses for the last [4 or 5] years that was never reported to us. . . . " (CP 1444-45).

[5] The response was based on declarations from Tom Cacciola and Peter Vetrano reiterating their statements in depositions and prior declarations. The response also included a declaration from their counsel refuting the statements in the motion that the latter was informed by the defendants' counsel that the stock to be transferred under the agreement was owned by the individual defendants, and that SIMS was not profitable at the time the agreement was entered. For example, on share origin, letters from its counsel show "that the shares to be distributed under the agreement are shares coming from SIMS. . . . " Moreover, none of the correspondence or documentation from its counsel references SIMS financial condition or its history of losses. If there were, there is no doubt that "it would have been included with [defendants' counsel's] declaration." (CP 1024-25).

counsel's arguments did not prevail, but were not frivolous. (Pet. App. C, 3-6).[6]

Re-notes of the motion for partial summary judgment were filed. (CP 1127, 1179). In October 1999, a motion for attorney fees and costs was granted for $47,865.90 against plaintiffs and their counsel. (Pet. App. C, 1-2). A lengthy response to the motion was filed. (CP 1592-93). A motion for reconsideration was denied. The order states that the partial summary judgment motion was mooted by the grant of the motion for summary judgment. (CP 1597).

Decisions on Appeal & Petition for Certiorari. On November 18, 1999, an appeal was timely filed from orders denying the motion for the recordings of plaintiffs' depositions, and granting the motion for summary judgment and for attorney fees and costs. On December 21, 1999, the Court of Appeals, by letter, provided a schedule for the appeal with a notice that the designation of clerk's papers must be filed by December 3, 1999. (Pet. App. D, 3).

On January 21, 2000, the statement of arrangements was filed by appellants with the Court of Appeals. On January 25, the Court sent correspondence to the parties approving the appellants' request for filing of the designation of clerk's papers on January 31, 2000. On January 31, the designation of clerk's papers was sent to the clerk for preparation and transmittal to the Court of Appeals.

On March 8, 2000, an extension for filing the opening brief was sought because the clerk had not completed the clerk's papers for the appeal. On March 9, the clerk granted the motion to April 28, 2000. On May 9, a first

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[6] The motion argued that the Court should award attorney fees and costs pursuant to CR 11 against plaintiffs' counsel. The Court rejected this argument, and its denial of a CR 11 award is reflected in the order. The order provided to the Court before entry had provisions for CR 11 sanctions. The Court lined out this part of the order, and interlined the following, "counsel's arguments did not prevail, but were not frivolous." (Pet. App. C, 5).

extension for filing the opening brief was requested by appellants. Appellants' counsel obtained employment with the federal government, and moreover, the respondents did not make a designation of clerk's papers for the appeal. The extension was granted to May 29. Supplemental designations of clerk's papers were necessary and filed by appellants on April 14 and June 14, 2000. The latter designations of clerk's papers were completed by the clerk on May 1, and July 10, 2000. (Pet. App. D, 304).

On June 21, 2000, the opening brief was sent to the clerk for filing. The brief (71 pgs.) and a motion to file an over-length brief were filed on June 23. The motion was denied on July 6, with a notation that the brief is due by July 17, 2000. The brief (50 pgs.) was re-filed on August 16 pursuant to correspondence of July 27 from the clerk. The final billings for the clerk's papers were paid in August. (4/24/01, Motion to Modify Ruling, pg. 13).

On September 8, 2000, appellants filed a motion to file a supplemental brief on issues that address the October 1999 order for attorney fees and costs. The brief (7 pgs.) includes these issues (lack of power to enter order and absence of findings as basis for reversal of order). On September 13, the motion was denied because the combined briefing exceeds fifty pages. In October 2000, appellants moved to modify this ruling, and with the motion, filed a fifty page brief with these issues conforming with the ruling under Washington Rule of Appellate Procedure ("RAP") 10.4(b).[7] Respondents did not file a response to the motions. (Pet. App. B, 4; D, 4).

In this period, respondents filed two motions for extensions to file a response brief. On September 22, 2000, a motion for an extension to October 22 to file a brief was filed. The motion was granted. On October 19, a motion for an extension to November 15, 2000, to file a brief, was

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[7] RAP 17.7 provides for review of a commissioner ruling by a motion to modify ruling directed to the judges of the court.

also filed. On October 25, the motion was granted. On November 13, 2000, the respondents' brief was filed.

On November 16, 2000, the appellants' October 10 motion to modify ruling was denied. The ruling stated that the motion to modify ruling was not a motion to modify but was a motion to submit a substitute brief, that the brief raises an issue not presented in the original brief (whether appellants' counsel is liable for respondents' attorney fees in the October 22, 1999, judgment), and that the respondents have not had the opportunity to address the issue in their brief filed November 13, 2000. The ruling imposed sanctions, and conditionally granted the motion on the payment by appellants of the sanctions ($500) to respondents. (Pet. App. B, 3).

On December 15, 2000, a motion to modify the November ruling was filed by appellants. The motion requested that the October brief be permitted without sanctions because the brief comes within the September 13 ruling and the requirements of RAP 10.4(b). More importantly, the respondents did not respond to the September and October motions to file the brief, and had more than two months to address the issues in their brief filed in November. The motion to modify ruling was denied on January 24, 2001. (Pet. App. B, 1-2).

On February 21, 2001, a motion for discretionary review was filed with the Washington Supreme Court. The motion initially observes that review of an interlocutory decision may be accepted under RAP 13.5(b), and that review may be expanded to all issues ruled on by the trial court. *Amend v. Bell*, 89 Wn.2d 124, 127, 570 P.2d 138 (1977). The motion also prefaces established state law that the rules are to be liberally interpreted to promote justice and facilitate the decision of a case on the merits. RAP 1.2(a); *State v. Lewis*, 93 Wn.2d 80, 83, 605 P.2d 1265 (1980). (Pt. App. D, 6).

The motion, in essence, restates the appellants' arguments in motion filings below, and argues that the rulings imposing sanctions, payable to respondents (for what amounts to putting the petitioners' counsel's name on a

judgment when there was no basis for this liability), for a brief that conforms with earlier rulings and the rules of appellate procedure, and where respondents had more than two months (and more time than allowed under RAP 10.2) to address the issues in their response brief filed on November 13, 2000, infringe due process and burden protected expression in the absence of an abuse of these rights in this case. (citing *Richards v. Jefferson County*, 517 U.S. 793, 797, 804 (1996); *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984) ("[p]rior restraints on speech . . . are governed by Art. I, Sec. 5 of the Washington Constitution. . . . Freedom of Speech. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right").

The respondents did not file a response to the motion. On March 26, 2001, a ruling on the motion held that the motion for discretionary review, which in essence requests that the Supreme Court accept review of this case, was filed for the purpose of delay and awarded additional sanctions ($500) against petitioners' counsel, payable to the Supreme Court. (Pet. App. A, 11).

In April 2001, petitioners filed a motion to modify the March ruling with the Washington Supreme Court.[8] The respondents did respond to the motion. On June 5, 2001, the Supreme Court denied petitioners' motion to modify the March ruling. (Pet. App. A, 4).

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[8] The motion expanded arguments on the prior restraint doctrine with citations to *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and *State v. Basset*, 128 Wn.2d 612, 911 P.2d 385 (1996), and argued that the rulings are in conflict with these cases. The motion also emphasized that briefs by parties to an appeal subsequent to filing of their briefs (supplemental briefs) are routinely allowed (without sanctions) to facilitate the decision of a case on the merits. RAP 1.2(a). Included with the motion were examples of orders on motions for supplemental briefs. (Motion to Modify Ruling, pgs. 16-20).

On June 25, 2001, petitioners filed a motion for a clarification and stay of the March and June orders pursuant to RAP 8.3. Unlike the January 2001 order, the March ruling and June 2001 order do not express that the appellants' October brief may even be filed or that the brief may be filed under monetary conditions provided in the order. The motion sought a clarification of the orders that petitioners may file their October brief on conditions designated by addendum to these orders. A stay was also sought of the March and June orders imposing sanctions as a condition to acceptance of the October brief, and of the provisions imposing sanctions for seeking discretionary review, or in the alternative, a partial stay of the ruling imposing sanctions for seeking discretionary review, until an appeal can be heard by the Supreme Court on its merits.[9] (Pet. App. D, 10-12).

On July 12, 2001, the Supreme Court entered the following order: 1) the motion and all relief therein is denied, 2) the sanctions imposed by the March ruling, and the directive that petitioners' counsel file acknowledgments from his clients that each has received a copy of that ruling, are hereby reaffirmed, 3) in the event petitioners' counsel does not pay the sanction and file the required acknowledgments by July 23, 2001, he shall be precluded from further participation as counsel in this cause in any of the courts of this state, and 4) this order is not subject to a motion for reconsideration, and will not be stayed. (Pet. App. A, 3).

Before the Washington Supreme Court, petitioners asserted constitutional arguments on the issues in this case. The arguments are that the rulings, and most recent

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[9] Under RAP 8.3, appellate courts may grant a stay pending the outcome of an appeal upon a showing that the issues on review are debatable, and the equities require that the status quo be maintained in order to preserve the fruits of the appeal if it should be successful. *Kennett v. Levine*, 49 Wn.2d 605, 606-08, 304 P.2d 682 (1956); *Shamley v. Olympia*, 47 Wn.2d 124, 126-27, 286 P.3d 702 (1955).

order, in addition to operating as a prior restraint, infringe due process and equal protection as extreme and arbitrary applications of state law in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process"), and also citing *Richards*, 517 U.S., at 804 (a "chose in action" is a property interest, and affirming due process principles that extreme applications of state-law res judicata principles violate the Federal Constitution); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 441-42 (1982) (Under the Equal Protection Clause, "This Court . . . has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded . . . is arbitrary")). (Pet. App. D, 17). The federal issues accordingly were properly raised in the Washington courts. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980).

REASONS FOR GRANTING THE PETITION

Section I of this petition and request for review by the United States Supreme Court explains that this Court has jurisdiction to review the Washington Supreme Court's recent orders under 28 U.S.C. § 1257(a), consistent with the standards in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Section II of this petition discusses the importance of the federal due process issues and the conflict between the apex of these decisions barring a motion for reconsideration before the Supreme Court and precluding petitioners' counsel from participating in this case except upon compliance with its unconstitutional orders, and the reasoning of this Court's decisions in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Section III discusses the importance of the federal issue in a prior

restraint setting, and the conflict between the decisions of the Washington Supreme Court and a number of this Court's prior decisions. Section IV addresses the equal protection arguments in this case, and anchors the decisions with this Court's equal protection cases that have found arbitrary state action. Before turning to these issues, it should be noted that this case involves private parties, and that the decisions of the Washington Supreme Court involve state action and are reviewable under the Fourteenth Amendment. This is clear from the cases in which this Court has reviewed state appellate procedures under the Fourteenth Amendment and the federal constitution in cases between private parties. See, *e.g., Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994); *Lindsey v. Normet,* 405 U.S. 56 (1972); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 340-44 (1816).

I.

THE DECISIONS OF THE SUPREME COURT OF WASHINGTON ARE REVIEWABLE BY THIS COURT PURSUANT TO 28 U.S.C. § 1257(a), UNDER THIS COURT'S DECISIONS IN *COX BROADCASTING CORP. v. COHN,* 420 U.S. 469 (1975), AND *RADIO STATION WOW v. JOHNSON,* 326 U.S. 120 (1944)

The issues in this case primarily involve the constitutionality of recent orders issued in the appeal by the Washington Supreme Court, which has decided the federal law issues in its decisions with further proceedings on the merits in the appeal to come in the state courts.

The appellate jurisdiction of this Court has been invoked by the petitioners under 28 U.S.C. § 1257. The statute requires that the judgment for which review is sought be final. Title 28 U.S.C. § 1257(a); *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637, 642 n. 3 (1975). This Court has held that a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal," and "it must also be final as an effective determination of the litigation and

not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997); *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

The finality principles of 28 U.S.C. § 1257 are not rigidly construed, however, and the Court has held that there are at least four categories of cases where the decision on the federal issue is treated as a final judgment, and where the Court has found jurisdiction to be appropriate in the presence of further proceedings anticipated in the state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). The relevant exceptions, as explained, provide that the Court may consider the following classes of cases:

> Second, there are cases such as *Radio Station WOW*, supra, and *Brady v. Maryland*, 373 U.S. 83 . . . in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings. . . .
>
> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the . . . outcome of the case. . . . *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 . . . (1973). (italics added).

Cox Broadcasting Corp., 420 U.S., at 480-81.

In *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), the authority of the Nebraska courts to award relief assertedly within the domain of the Federal Communications Commission was held separable from the accounting which was to take place in the state courts. The federal issue was held reviewable by this Court despite the pending accounting because the state court judgment rejecting the federal claim and directing the transfer of properties of a federally licensed radio station was deemed "dissociated from a provision for an

accounting even though that is decreed in the same order." *Id.*, at 126. The Court also noted, "In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Id.* In passing on this case, the Court in *Cox Broadcasting* further noted, "Nothing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question." 420 U.S., at 480.

In *North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156 (1973), a Pharmacy Board denied an application for a pharmacy permit under a statute requiring that the applicant be a registered pharmacist in good standing or a corporation in which the majority of the stock is owned by registered pharmacists in good standing employed in and responsible for the management and operation of the pharmacy. The common stock of Snyder's Stores was owned by another corporation, and it wasn't shown that any of the shareholders of the latter were pharmacists registered and in good standing in North Dakota. The state courts held the statute unconstitutional and remanded the case to the Board for further consideration of the application in the absence of the ownership requirements in the statute. 414 U.S., at 157-58. The Board appealed the case to this Court, in effect arguing that the statute was constitutional.

In *Cox Broadcasting,* the Court emphasized that in the *North Dakota Pharmacy Bd.* case, the finality requirement was satisfied despite the fact that litigation had not terminated in the state courts. The Court observed that "[t]he federal issue would not survive the remand, whatever the result of the state administrative proceedings. The Board might deny the license on state law grounds, thus foreclosing the federal issue, and the Court also ascertained that under state law the Board could not bring the federal issue here in the event the applicant satisfied the requirements of state law except for the invalidated statute.

Under these circumstances, the issue was ripe for review. *Cox Broadcasting Corp.*, 420 U.S., at 482.

In *Cox Broadcasting*, the Court commented on *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), in alliance with its discussion of the *North Dakota Pharmacy Bd.* case. *Cox Broadcasting Corp.*, 420 U.S., at 482. In *Cohen*, a federal district court exempted the plaintiffs in a stockholder's suit from filing a bond as security for costs, which was a prerequisite to maintaining the action. The Third Circuit Court of Appeals reversed, and this Court held that the latter decision was a final judgment under 28 U.S.C. § 1291, and that the issue of security for costs was separable from and independent of the merits. The Court also reasoned that if review were postponed until the termination of the litigation, "it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." 337 U.S., at 546.

The present case unambiguously falls into these categories of cases where the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257, and has found jurisdiction to be appropriate without awaiting the completion of the additional proceedings in the state courts. Consistent with the Court's reasoning in *Cox Broadcasting Corp.*, and *Radio Station WOW*, the federal issues would not be mooted or otherwise affected by the proceedings anticipated in the state courts because the proceedings are unrelated to these issues. The issues now before the Court involve the constitutionality under the Fourteenth Amendment of recent orders issued in the appeal by the Washington Supreme Court, which has decided the federal law issues in its decisions with further proceedings in the appeal anticipated in the state courts. The federal issues are whether the rulings below operate as a prior restraint, and infringe due process and equal protection principles in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The rulings have barred a motion for reconsideration in a meritorious case before the Supreme Court, have precluded petitioners' counsel from participating in this case except upon compliance with its unconstitutional orders, and have imposed sanctions for filing a motion for discretionary review (on the basis that the motion was filed for the purpose of delay, when the motion clearly sought accelerated review of the issues in this case), and have levied sanctions for filing a brief in conformance with earlier rulings and the rules of appellate procedure. These issues are clearly separable from and independent of the merits of this case, a securities action involving state securities and related common law claims. As in *Radio Station WOW*, nothing that could happen in the course of this case, short of settlement, would foreclose or make unnecessary a decision on the federal questions.

Conversely, it is theoretically the case that the federal issue would not survive a remand (however remote the latter contingency is given the posture of the rulings thus far below) whatever the result of the appeal proceedings. Thus, if the petitioners ultimately prevail on the merits, the federal issues will be mooted. *Cox Broadcasting Corp.*, 420 U.S., at 481. In this aspect, the only way that this Court will be able to reach the constitutional issues is if the respondents eventually file a petition for certiorari and petitioners herein file a cross-petition. When a case is in this posture, the Court has considered it sufficiently final to justify review. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 (1987). Additionally, as in *North Dakota Pharmacy Bd.*, assuming that a remand occurs, petitioners' claims might be denied "on state law grounds, thus foreclosing the federal issue." *Cox Broadcasting Corp.*, 420 U.S., at 482. This is soberly true where an appeal in the state courts is affirmed on adequate and independent state grounds, and no reason for filing a petition for certiorari affecting the merits on federal grounds exists.

II.

THE DECISIONS OF THE SUPREME COURT OF WASHINGTON RAISE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW, AND CONFLICT WITH THIS COURT'S DUE PROCESS DECISIONS IN *HONDA MOTOR CO. v. OBERG*, 512 U.S. 415 (1994), AND *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422 (1981)

In a number of this Court's cases, it has consistently been held that a cause of action is a form of property protected by the Due Process Clause of the Fourteenth Amendment. *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930). These cases in essence involved state court deprivations of property through dismissals of actions without a remedy.

The Due Process Clauses of the Fifth and Fourteenth Amendments protect litigants who seek recourse in the Courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan*, 455 U.S., at 429. The Due Process Clause has been held to prevent the States from denying individuals the use of established adjudicatory procedures, when the denial would be the "equivalent of denying them an opportunity to be heard upon their claimed rights." *Id.*, at 429-30 (citing *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573 (1975).

In *Logan*, the Court continued, "Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.' " 455 U.S., at 430-31, citing *Board of Regents v. Roth*, 408 U.S. 564, 571-72, 576-77 (1972); *Barry v. Barchi*, 443 U.S. 55,

64-66 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div. v. Craft, supra* (utility services); *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976) (disability benefits); *Goss v. Lopez, supra* (high school education).

As in these cases, and as in *Logan,* where the right to use Fair Employment Practices Act adjudicatory procedures was found to share the characteristics of the entitlements in these cases, the right to use established adjudication procedures under Washington law in appeal proceedings is no less of an entitlement grounded in state law, and equally shares the characteristics in these cases.[10]

An individual in an appeal in Washington, as in most states, has more than a hypothetical desire or interest in the redress of the appeal. The right to appeal is guaranteed by the state, with the adequacy of a claim or defense in an appeal of a summary judgment assessed under what in essence equates to what *Logan* described as a substantiality of the evidence standard. 455 U.S., at 431. This is comparable to a summary judgment standard and the de novo review accorded in an appeal of a summary

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[10] The Washington Rules of Appellate Procedure form the basis of the entitlement under state law. RAP 1.1 provides, Scope of Rules: (a) Review of Trial Court Decision. These Rules govern proceedings in the Supreme Court and the Court of Appeals for review of a trial court decision; (b) Review of Decision of Court of Appeals. These rules also establish the procedure for seeking review of a decision of the Court of Appeals. RAP 5.1(a) provides in part, "A party seeking review of a trial court decision reviewable as a matter of right must file a notice of appeal. . . . " RAP 6.1 provides, Appeal as a Matter of Right. The appellate court "accepts review" of a trial court decision upon the timely filing . . . of a notice of appeal from a decision which is reviewable as a matter of right. The rule references RAP 2.2, which states in part, "(a) . . . Unless otherwise prohibited by statute or court rule . . . a party may appeal from only the following superior court decisions: (1) Final Judgment. The final judgment entered in any action or proceeding. . . . "

judgment where the presence of an issue of material fact prevents the entry of summary judgment. See Washington Civil Rule 56(c); *Marquis v. Spokane*, 130 Wn.2d 97, 104-05, 922 P.2d 43 (1996). The Court's holdings in *Martinez v. California* and later in *Logan*, reflect that the burden of proof and the de novo review accorded in this setting are procedural aspects of the property interest. *Martinez*, 444 U.S., at 282; *Logan*, 455 U.S., at 433. It is fundamental that state rules of appellate procedure are necessary components of this interest.

This Court's decisions have emphasized that the "Due Process Clause grants the aggrieved party the opportunity to present his case and have the merits fairly judged," 455 U.S., at 433. The Court has also held that when "a statutory scheme makes liability an important factor in the State's determination . . . , [it] may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Bell v. Burson*, 402 U.S. 535, 541 (1971). With equal force, the Court has more recently held that, "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

On what grounds were the orders of the Washington Supreme Court in this case based on? The rulings have barred a motion for reconsideration in a meritorious case, have precluded petitioners' counsel from participating "in this cause in any of the courts of this state" (with disbarment no doubt to follow) except upon compliance with its orders, and have imposed sanctions for filing a motion for discretionary review on the outward basis that the motion was filed for the purpose of delay, and have exacted sanctions (with more sanctions currently imposed, as the Supreme Court record will show) for filing a brief in conformance with earlier rulings and the rules of appellate procedure. It seems to believe that there is no basis for the constitutional arguments that were

asserted before it under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that the arguments are frivolous, and its rulings on these issues have so held. (Pet. App. A, 3 & 11).

The July 2001 order imposed the bar and exclusion sanctions on the petitioners' motion for a clarification and stay of its prior orders, and in addition to denying all relief, held that the sanctions imposed by the March ruling are hereby affirmed. The March ruling arbitrarily states that the motion for discretionary review, which clearly requests that the Supreme Court accept review of this case, was filed for the purpose of delay and awarded sanctions payable to the Supreme Court, pursuant to RAP 18.9(a). How can a motion which seeks review by a state's highest court of all issues in the case, such as petitioners' motion, be classified as having been filed for the purpose of delay, when the motion seeks accelerated review by the Supreme Court, and when the case will ultimately be appealed on a petition for review which is a longer process? There is no basis in the record for the ruling's conclusory statement that the motion "was filed for the purpose of delay."

This is like the Missouri Supreme Court's holding in *Brinkerhoff-Faris Co. v. Hill, supra,* in which this Court reversed the state court's dismissal of a civil case because the plaintiff had adequate administrative remedies which it did not pursue (when none were available), and which held that the plaintiff "was clearly of laches in not so doing." 281 U.S., at 675-76. (Pet. App. D, 8-9).

The ruling also erroneously states, "Given the history of this appeal, as summarized above, I see not the remotest possibility that this court would disapprove the Court of Appeals order conditioning the acceptance of the October brief on [the] payment of terms to respondents. There is thus no arguable basis for review under RAP 13.5(b)." (Pet. App. A, 11). The history of the appeal, "as summarized" in the ruling, is so arbitrary as to reflect a searing prejudice that itself is a denial of due process,

or that no attention was paid to the record at all. (Pet. App. D, 8-9, 13-16).

More prominently, the March 2001 ruling and subsequent orders have imposed sanctions against the petitioners, payable to respondents (for briefing issues on what amounts to illicitly placing the petitioners' counsel's name on a judgment when there was no basis for this liability), as a condition to the filing of the October brief under circumstances where the brief conforms with earlier rulings (9/13/00 ruling) and the rules of appellate procedure (RAP 10.4(b)) pursuant to a properly filed motion to modify ruling, where the respondents filed motions in September and October for extensions to file their brief, and where they had more time than is allowed under RAP 10.2 to address the issues in their brief when it was filed under extensions in November 2000. (see pgs. 9-10, above).[11]

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[11] According to the March ruling, these issues and the constitutional arguments on these issues are frivolous. (Pet. App. A, 8-9). To the contrary, the issues are highly meritorious, as is the issue of placing someone's name on a judgment when there is no basis for this liability. Under state law, attorney fees may be awarded only if authorized by contract, statute or recognized ground in equity (*i.e.*, common fund/benefit theory), *Bowles v. Retirement Systems*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). The only plausible basis for a judgment against petitioners' counsel is statutory. RCW 4.84.185 (frivolous actions and defenses) applies to sanctions against a party, and CR 11 applies to sanctions against an attorney. *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992); *Havsy v. Flynn*, 88 Wn. App. 514, 521, 945 P.2d 221 (Div. II, 1997). Thus, the only ground for a judgment is CR 11, which applies to pleadings and motions not grounded in fact or law. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). The trial court rejected this argument, and its denial of an award on this basis is reflected in the order, "counsel's arguments did not prevail, but were not frivolous," (see pg. 8 n. 6, above). This precludes any finding that CR 11 was violated in this case. See *Biggs*, 124 Wn.2d at 197 (CR 11 is not meant to act as a fee shifting mechanism, but rather as a

As in *Bell v. Burson, supra,* the March ruling may not eliminate consideration of liability factors or dictate these factors apart from the rules of appellate procedure in imposing sanctions. RAP 18.9 provides the basis for sanctions in an appeal, and allows for damages to any party who has been harmed by another party's use of the rules for delay or the failure to comply with the rules. The extensions sought by respondents in September and October to file a response brief were not based on attempts by petitioners to file their brief, and the motions do not reference this as a basis for the extensions, but were requested "[d]ue to a heavy case schedule" (9/22/00 motion), and a vacation by respondents' counsel (10/19/00 motion). (Pet. App. D, 9). Equally important, supplemental briefs are routinely allowed without sanctions to promote the decision of a case on the merits. (Pet. App. D, 9). This is especially true where the brief is filed long before a response brief is filed. There were no grounds for the sanctions that were imposed. The ruling is arbitrary.

The petitioners are being sanctioned by the state courts for conduct that is not in violation of any rules, and if there is a basis for the sanctions that have been (and are being) imposed upon the petitioners, it is not apparent in the record. This Court's due process cases have "recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' " *Logan,* 455 U.S., at 432. "Any other conclusion would allow the State to destroy at will

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deterrent to frivolous pleadings.). *Contrary to the Washington Supreme Court's rulings, constitutional arguments on the arbitrary nature of the sanctions that are being imposed against petitioners as a motion of due process in these circumstances are clearly relevant and well founded.*

virtually any state-created property interest." *Id.* This result is what has occurred, and is occurring, in this case.

The purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *Honda Motor Co. v. Oberg, supra,* 512 U.S., at 434. "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.,* at 430-32. As in that case, the safeguards of judicial review in appeal proceedings through procedural protections which state law or the common law provide against arbitrary deprivations of property, are removed by state court rulings which import wide discretion and biases that violate due process in the absence of safeguards against that danger. Washington has removed these safeguards in this case, and its denial of these protections violates the Due Process Clause of the Fourteenth Amendment.

III.

THE DECISIONS OF THE SUPREME COURT OF WASHINGTON RAISE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AND CONFLICT WITH THE PRIOR RESTRAINT DOCTRINE UNDER THIS COURT'S DECISION IN *GENTILE v. STATE BAR OF NEVADA,* 501 U.S. 1030 (1991)

A long line of this Court cases have held that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment Rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). " . . . it is the chief purpose of the [First Amendment] guarantee to prevent previous restraints upon publication." *Near v. Minnesota,* 283 U.S. 697, 713 (1931).

A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence. *Alexander v. United States,* 509 U.S. 544, 550 (1993); *Soundgarden v. Eikenberry,* 123 Wn.2d 750, 764, 871 P.2d 1050,

cert. denied, 513 U.S. 1056 (1994). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Nebraska Press Ass'n*, 427 U.S., at 558; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Bernstein v. U.S. Dep't of Justice*, 176 F.3d 1132, 1138 (9th Cir. 1999); *Soundgarden*, 123 Wn.2d, at 765.

The constitutional standard for limitations placed on speech of lawyers participating in judicial proceedings is based on whether the speech has a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1069, 1075 (1991). The limitations may be no broader than necessary to protect the integrity and fairness of the judicial system and the right to a fair trial. *Id.*, at 1075; *U.S. v. Salameh*, 992 F.2d 445, 447 (2nd Cir. 1993); *State v. Basset*, 128 Wn.2d 612, 615-16, 911 P.2d 385 (1996). Restraints on speech in this setting must be narrowly tailored to achieve those objectives, and may impose only narrow and necessary limitations on speech. *Gentile*, 501 U.S., at 1075-76. Regulation in this context is limited – it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, and it merely postpones the attorneys' comments until after trial. *Id.*, at 1076.

The rulings in this case are in conflict with the principles in these cases. The recent July 2001 order barred a motion for reconsideration by petitioners of the motion for a clarification and stay of prior orders, and independently precluded petitioners' counsel from participating "in this cause in any of the courts of this state" except upon compliance with the order. In addition to denying all relief, the July order affirmed the sanctions imposed by the March ruling as a condition to the filing of the October brief. (Pet. App. A, 3).

The bar and exclusion sanctions imposed by the July order and the March ruling fall far short of the constitutional standard. The prohibition on speech imposed by

the July order barring a motion for reconsideration is not narrowly tailored to meet the objectives of the standard, but has the opposite effect. The order completely and unconditionally bars a motion for reconsideration by petitioners of the Washington Supreme Court's July order. The practical effect of the exclusion sanction is that unless the sanctions in the order are complied with, petitioners' counsel is effectively excluded from the case, and speech is banned prior to its occurrence. The order neglects a finding that alternatives to these sanctions would not be adequate to meet the standard. The March ruling approving and imposing more sanctions as a condition to the filing of the October brief is really no different. There is no suggestion in the record that the ruling considered any less restrictive alternatives to the sanctions that were imposed. Moreover, the record supports a conclusion that alternatives to the restraints exist. (Pet. App. D, 18).

Unlike the proceedings in *Gentile,* and the order in *Salameh,* the orders in this case do not involve extrajudicial statements by an attorney in a press conference (*Gentile*), and do not embrace an order barring counsel for all parties to the action from publicly discussing any aspect of the action (*Salameh*), but rather, involve orders that are quite dissociated from this context, encompassing an injunction by the Washington Supreme Court against petitioners barring a motion for reconsideration before it. In this setting, it is doubtful if the standard in *Gentile* applies. A motion for reconsideration rarely, if ever, involves public statements, and more realistically comprises points of view in factual and legal arguments (as it would have in this case) in the motion and responsive papers before the court. The standard is neutral as to points of view, *id.,* at 1076, and would exclude all such motions from its application.

In this context, the higher standard for regulation of the press in *Near* and *Nebraska Press Ass'n* is arguably a better gauge for regulating speech because there is no meaningful distinction between points of view expressed in, for example, newspapers, and legal documents in public records. The July 2000 order, like the injunction in *Near*, completely suppresses publication and is a true restraint on future speech. See *Alexander*, 509 U.S., at 550 ("*Near* . . . involved a true restraint on future speech – a permanent injunction."). "This is of the essence of censorship." See *Near*, 283 U.S., at 713. Under either standard, the July order and the March ruling violate the petitioners' rights under the First Amendment.

IV.

THE DECISION OF THE SUPREME COURT OF WASHINGTON RAISES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW, AND CONFLICTS WITH THIS COURT'S EQUAL PROTECTION DECISIONS IN *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422 (1981), AND *LINDSEY v. NORMET*, 405 U.S. 56 (1972)

In *Lindsey v. Normet*, the Court's opinion, by Justice White stated, "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S., at 77. As in *Lindsey*, where the double-bond requirement imposed by Oregon Law on tenants seeking to appeal decisions in eviction actions was found to violate the Equal Protection Clause, the July order and March ruling heavily burden the right to appeal.

The basis of the equal protection argument is that the treatment being accorded to petitioners is arbitrary. The March ruling, for example, provides that the motion for discretionary review was filed for the purpose of delay,

when the motion clearly sought accelerated review of the issues in this case (*ante*, at 22), and also randomly references approved extensions sought by petitioners (which were also requested by respondents) prior to filing of the opening brief as a basis for splintering the motion and substantiating sanctions in the appeal. The extensions were granted where the record had not been completed by the clerk for the appeal, where respondents did not make a designation of clerk's papers, and supplemental designations of clerk's papers were necessary and filed by petitioners, and where respondents also sought extension (which the March ruling overlooks) which were granted by clerk notations as the record shows. (Pet. App. D, 9). The ruling also approved and imposed further penalties against petitioners as conditions to submission of the October brief under circumstances where sanctions could not be imposed except on arbitrary grounds (*ante*, at 23-24).

The July order affirming earlier rulings, barring a motion for reconsideration by petitioners, and excluding their counsel from this case except on compliance with the order was, as explained in Section 1, a final judgment terminating review on these issues, and the question is whether the classifications created by the order are rationally related to a state interest that would justify them.

As in *Lindsey* and *Logan*, a state may validly take steps to provide for the "prompt [and] peaceful resolution of disputes over the right to possession of real property," 405 U.S., at 70, or to further the "just and expeditious resolutio[n]" of employment disputes, 455 U.S., at 440, and as in this case, may provide rules of appeal to facilitate the resolution of appeals, but in so doing, may not run afoul of equal protection scrutiny. Under *Lindsey*, arbitrary classifications by a State that burden the right to appeal violate the Equal Protection

Clause under even the most deferential standard of review.

The penalties imposed by the July order and March ruling have no discernible or identifiable relation to any stated interest or purpose that would justify the sanctions that have been imposed against petitioners in this case. If there is a basis for the penalties, it is not apparent in the record. The adjudications have converted similarly situated claims (the right to lawfully participate as a lawyer in the appeal of a case, the right to submit arguments in a motion for reconsideration, to submit a properly filed brief, and a properly filed motion for discretionary review in the absence of arbitrary penalties) into dissimilarly situated claims with arbitrary distinctions in the rulings as a basis for unequal and inequitable classifications. "This . . . is the very essence of arbitrary state action." "[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out' . . . and that rationality is absent here." *Logan*, 455 U.S., at 442.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

THOMAS CACCIOLA, et ux., et al.,

Petitioners,

v.

SIMS COMMUNICATIONS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

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THE SUPREME COURT OF WASHINGTON

THOMAS CACCIOLA and MARLENE CACCIOLA, and PETER VETRANO and LENA VETRANO,

Petitioners,

v.

SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN M. MARKS and JANE DOE MARKS, individually and as a marital community; JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community; MARK BENNETT and JANE DOE BENNETT, individually and as a marital community; MICHAEL MALET and JANE DOE MALET, individually and as a marital community; MARVIN BERGER and JANE DOE BERGER, individually and as a marital community; CHET HOWARD and JANE DOE HOWARD, individually and as a marital community; GEORGE PURSGLOVE and JANE DOE PURSGLOVE, individually and as a marital

ORDER

No. 70689-1

C/A No. 45616-4-I

(Filed Jul. 12, 2001)

community; CORNELIA ELDRIDGE and JOHN DOE ELDRIDGE, individually and as a marital community; and JOHN DOES and JANE DOES 1-50,

Respondents.

By a ruling filed March 26, 2001, this court's Commissioner denied a motion for discretionary review filed by attorney John Keefe on behalf of petitioners Thomas and Marlene Cacciola and Peter and Lena Vetrano. That ruling also imposed a sanction of $500 against Mr. Keefe personally, and directed Mr. Keefe to furnish this court with an acknowledgment from each of his clients stating that each had been given a copy of the ruling. The ruling further directed Mr. Keefe to pay the sanction and file the acknowledgments "not later than 30 days after the date of this ruling, or, in the event Mr. Keefe files a motion to modify this ruling, and that motion is denied, within 10 days thereafter."

Mr. Keefe filed a motion to modify the Commissioner's ruling on April 24, 2001. Department One of this court considered the motion on June 5, 2001, and by order entered that date unanimously denied it. The Clerk mailed copies of that order to counsel that same day, and in a cover letter reminded Mr. Keefe "of the need by not later than June 15, 2001, to comply" with the directives contained in the Commissioner's March 26, 2001, ruling.

Mr. Keefe has not yet complied with those directives. On June 25, 2001, however, he filed a pleading entitled

"Motion for Clarification and a Stay of Interlocutory Orders (Rule of Appellate Procedure 8.3)." Consideration of this motion was referred to the court's July 12, 2001, en banc conference.

IT IS HEREBY ORDERED:

(1) The motion, and all relief sought therein, is denied.

(2) The $500 sanction imposed by the Commissioner's March 26, 2001, ruling, and the directive that Mr. Keefe file an acknowledgement from each of his clients stating that each has received a copy of that ruling, are each hereby reaffirmed. In addition, Mr. Keefe shall file an acknowledgment from each of his clients stating that each has received a copy of this court's June 5, 2001, order and a copy of this order.

(3) In the event that Mr. Keefe does not pay the sanction and file the required acknowledgments by not later than July 23, 2001, he shall be precluded from further participation as counsel in this cause in any of the courts of this state.

(4) This order is not subject to a motion for reconsideration, *see* RAP 12.3(a) and RAP 12.4(a), and will not be stayed, *see* RAP 12.6.

DATED at Olympia, Washington this 12th day of July, 2001.

/s/ Gerry L. Alexander
CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

THOMAS CACCIOLA and MARLENE CACCIOLA, and PETER VETRANO and LENA VETRANO,

Petitioners,

v.

SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN M. MARKS and JANE DOE MARKS, individually and as a marital community; JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community; MARK BENNETT and JANE DOE BENNETT, individually and as a marital community; MICHAEL MALET and JANE DOE MALET, individually and as a marital community; MARVIN BERGER and JANE DOE BERGER, individually and as a marital community; CHET HOWARD and JANE DOE HOWARD, individually and as a marital community; GEORGE PURSGLOVE and JANE DOE PURSGLOVE,

ORDER

No. 70689-1

C/A No. 45616-4-I

(Filed Jun. 5, 2001)

individually and as a marital community; CORNELIA ELDRIDGE and JOHN DOE ELDRIDGE, individually and as a marital community; and JOHN DOES and JANE DOES 1-50,

Respondents.

Department I of the Court considered this matter at its June 5, 2001, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That Petitioners' Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 5th day of June, 2001.

/s/ Gerry L. Alexander
CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

THOMAS CACCIOLA and MARLENE CACCIOLA, and PETER VETRANO and LENA VETRANO,

Petitioners,

v.

SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN M. MARKS and JANE DOE MARKS, individually and as a marital community; JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community; MARK BENNETT and JANE DOE BENNETT, individually and as a marital community; MICHAEL MALET and JANE DOE MALET, individually and as a marital community; MARVIN BERGER and JANE DOE BERGER, individually and as a marital community; CHET HOWARD and JANE DOE HOWARD, individually and as a marital community; GEORGE PURSGLOVE and JANE DOE PURSGLOVE,

No. 70689-1

RULING DENYING REVIEW AND IMPOSING SANCTIONS

(Filed Mar. 26, 2001)

individually and as a marital community; CORNELIA ELDRIDGE and JOHN DOE ELDRIDGE, individually and as a marital community; and JOHN DOES and JANE DOES 1-50,

Respondents.

This is a classic example of how not to pursue an appeal.

On November 18, 1999, attorney John M. Keefe, on behalf of Thomas and Marlene Cacciola and Peter and Lena Vetrano, filed a notice of appeal to the Court of Appeals from three orders entered by the King County Superior court. The first of those orders, dated June 24, 1999, denied a motion by plaintiffs to obtain deposition recordings. The second order, filed August 27, 1999, granted the defendants' motion for summary judgment. And the third order, filed October 22, 1999, awarded attorney fees and costs to defendants in the amount of nearly $48,000, that award being entered as a judgment against "plaintiffs and/or their attorney of record, John Keefe."

Since the filing of the notice of appeal, almost nothing has happened as or when the rules prescribe.

On December 21, 1999, the Court of Appeals notified attorney Keefe that he needed to file proof of service of the notice of appeal, as required by RAP 5.4(b). Mr. Keefe

eventually provided the proof of service by a declaration filed January 4, 2000.

On January 5, 2000, the Court of Appeals Clerk reminded Mr. Keefe that he had not timely filed a Designation of Clerk's Papers and a Statement of Arrangements. Mr. Keefe responded on January 21 with a Statement of Arrangements informing the court that he would not be filing a Verbatim Report of Proceedings. He also moved to extend the time to file his Designation of Clerk's Papers to January 31, 2000. The court granted that motion. Mr. Keefe filed his Designation of Clerk's Papers on February 2.[1]

On March 8, Mr. Keefe filed his first motion for an extension of time to file the appellants' opening brief. He requested an extension from March 20 to June 2. By notation order dated March 9, the Court of Appeals Clerk granted the extension, but only to April 28, noting that this represented a five-week extension of time. April 28 came and went. On May 11, Mr. Keefe sought a further extension to May 29. The Clerk granted that motion.

When no appellants' brief was received by May 29, the Clerk set the matter for a court's motion to impose sanctions or dismiss. That motion was noted for June 23, 2000. Mr. Keefe's opening brief was received that day, and the court's motion was stricken. The brief was 71-pages long, however, and therefore significantly over-length. On July 6, the Acting Chief Judge denied Mr.

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[1] As late as August, however, the King County Department of Judicial Administration was still dunning Mr. Keefe for the past-due charges for those Clerk's Papers.

Keefe's motion to file an overlength brief, and gave him until July 17 to file a replacement brief.

On July 20, Mr. Keefe filed yet another motion for an extension, which the Clerk granted to August 14, 2000. Mr. Keefe filed his brief that day. It was exactly 50 pages in length, the maximum permitted by RAP 10.4(b).

Not quite a month later, on September 8, the court received from Mr. Keefe a "supplemental opening brief," consisting of 7 more pages, together with a motion to file that brief. Mr. Keefe explained in his motion that his opening brief "inadvertently omitted to assign error to the order of October 22, 1999, granting the defendants' motion for attorney fees and costs." By notation order dated September 13, Commissioner Ellis denied the motion "for the reason that the combined briefing exceeds 50 pages." It also seems curious that the primary argument Mr. Keefe had "inadvertently" failed to raise earlier (even in his rejected 71-page brief) was not that attorney fees were wrongly awarded against his clients, but that her personally should not be liable on that award with them.[2] On October 11 Mr. Keefe filed a "motion to modify" Commissioner Ellis's ruling. In that motion Mr. Keefe reversed his earlier "inadvertent omission" position, claiming instead that his August 16 brief had in fact assigned error to the attorney fee order. The referenced pages in his August brief do not support his new claim, however. In any event, with the "motion to modify" Mr. Keefe submitted a new 50-page brief, which he

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[2] This seems to put Mr. Keefe's financial interest in direct conflict with the interests of his clients.

had edited to allow room for argument on the attorney fee issue.

In light of the submission of that new brief, Commissioner Ellis construed the total October 11 package as a motion to submit a substitute appellants' brief rather than a motion to modify. Commissioner Ellis granted that motion and allowed the substitute brief to be filed, on the condition that Mr. Keefe pay terms of $500 to respondents to partially cover the expense they would incur in revising their brief.

Mr. Keefe moved to modify that Commissioner's ruling on December 15, 2000, arguing that he should be permitted to file his replacement brief without payment of any terms. A panel of judges denied that motion by order dated January 24, 2001, but extended the time for Mr. Keefe to pay the terms for 10 days after that order. Mr. Keefe moved for discretionary review by this court on February 21, 2001.

Incredibly, Mr. Keefe now argues that the imposition of $500 in terms as a condition for filing his October brief "infringe[s] due process as an immoderate application of state law, and burden[s] protected speech in the absence of an abuse by appellants of these rights." Motion to Modify at 9. The authority he cites for this assertion is, not surprisingly, wholly inapposite. Likewise frivolous is Mr. Keefe's claim that his briefing shenanigans could not have prejudiced the respondents because respondents had not yet filed their own brief. Whenever that brief was filed, Mr.Keefe's moving target undoubtedly required additional work from respondents' counsel. Mr. Keefe also seems to argue that, as long as the case is here, this

court should simply take up all of the issues presented in the appeal, and he rehearses a number of those additional issues. He does not suggest any basis on which those issues might independently warrant direct review, however. *See* RAP 4.2(a).

Given the history of this appeal, as summarized above, I see not the remotest possibility that this court would disapprove the Court of Appeals order conditioning the acceptance of the October brief on Mr. Keefe's payment of terms to respondents. There is thus no arguable basis for review under RAP 13.5(b). The motion for discretionary review is accordingly denied. Moreover, I am left with the firm conviction that Mr. Keefe's motion for discretionary review was filed for the purpose of delay. Because respondents filed no answer to the motion, I will not award additional terms to them. I will, however, award a sanction of $500 against Mr. Keefe personally, payable to this court. RAP 18.9(a). The sanction shall be paid not later than 30 days after the date of this ruling, or, in the event Mr. Keefe files a motion to modify this ruling, and that motion is denied, within 10 days thereafter. In the same time frame, Mr. Keefe shall furnish this court with an acknowledgement from each of his clients stating that each has been given a copy of this ruling.

/s/ Geofrey Crookes
COMMISSIONER

March 26, 2001

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

THOMAS A. CACCIOLA and MARLENE CACCIOLA, husband and wife; PETER VETRANO and LENA VETRANO, husband and wife,

Appellants,

v.

SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN M. MARKS and JANE DOE MARKS, individually and as a marital community; JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community; MARK BENNETT and JANE DOE BENNETT, individually and as a marital community; MICHAEL MALET and JANE DOE MALET, individually and as a marital community; IAN HART and JANE DOE HART, individually and as a marital community; MARVIN BERGER and JANE DOE BERGER, individually and as

No. 45616-4-I

ORDER DENYING MOTION TO MODIFY

(Filed Jan. 24, 2001)

a marital community; CHET HOWARD and JANE DOE HOWARD, individually and as a marital community; GEORGE PURSGLOVE and JANE DOE PURSGLOVE, individually and as a marital community; CORNELIA ELDRIDGE and JANE DOE ELDRIDGE, individually and as a marital community; and John Does and Jane Does 1-50,

Respondents.

Appellants filed a motion to modify the commissioner's November 15, 2000, ruling that appellants' prior motion to modify would be considered as a motion to submit a substitute appellants' brief and granting the motion contingent on appellants' counsel paying terms of $500 to respondent. A panel of this court has considered the matter pursuant to RAP 17.7 and has determined that the motion should be denied. The time for paying the terms ordered by the commissioner is extended to 10 days after this order.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 24th day of January, 2001.

/s/ Cox, J.

/s/ Appelwick, J

/s/ Baker, J.

The Court of Appeals of the
State of Washington Seattle 98101-4170

[Names And Addresses Omitted In Printing]

November 16, 2000

CASE #: 45616-4-1
Thomas A. Cacciola and Marlene Cacciola, App. vs
Sims Communications, Inc., et al., Res.

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on November 15, 2000, regarding appellant's motion to modify ruling:

This is not a motion to modify but rather a motion to submit a substitute appellant's brief. Counsel's representation to the contrary, the substitute brief raises an issue not presented in the original brief – whether counsel is liable for the attorney fee award. Respondent has not had an opportunity to address that issue and did not do so in the respondent's brief. The motion will be granted and the substitute brief allowed on the condition that appellant's counsel pay terms of $500 to respondent by November 30, 2000. The terms are intended to cover the expense of submitting a revised respondent's brief. Respondent shall have 30 days after payment of the terms to submit a revised brief. In the event the terms are not paid, the original appellant's and respondent's brief will be the briefs considered on appeal.

Sincerely, /s/ Richard D. Johnson
Richard D. Johnson, Court Administrator/Clerk
khn

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

[Name And Address Omitted In Printing]

September 13, 2000

John M. Keefe
Attorney At Law
1120 Fremont Ave
South Pasadena, CA. 91030

David George Kontos
Attorney At Law
25422 74th Ave South
Kent, WA. 98032-6011

CASE #: 45616-4-I
Thomas A. Cacciola and Marlene Cacciola, App. vs
Sims Communications, Inc., et al., Res.

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on September 13, 2000, regarding appellant's motion to file supplemental opening brief:

Denied for the reason that the combined briefing exceeds 50 pages.

Sincerely,

/s/ Richard D. Johnson
Richard D. Johnson
Court Administrator/Clerk

khn

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

THOMAS A. CACCIOLA and MARLENE CACCIOLA, husband and wife; and PETER VETRANO and LENA VETRANO, husband and wife, Plaintiffs, vs. SIMS COMMUNICATIONS, INC., a Delaware corp.; et al., Defendants.	**NO. 97-2-22252-4SEA** **ORDER ON DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS** (Filed Oct. 22, 1999)

JUDGMENT SUMMARY

1. Judgment Creditor: Sims Communications, Melvin Leiner, Darren Marks and James Caprio
2. Judgment Debtor: Thomas and Marlene Cacciola, Peter and Lena Vetrano, and John Keefe
3. Principal Judgment Amount: $
4. Interest to Date of Judgment: $
5. Costs: $
6. Attorney's fees $47,865.90
7. Other recovery amount: $
8. Principal judgment shall bear interest at 12% per annum.

9. Attorney's fees shall bear interest at 12% per annum.

8. Judgment Creditor's Attorney: David G. Kontos

9. Judgment Debtor's Attorney: John Keefe

THIS MATTER having come before the undersigned Judge, by means of Motion for Attorney's Fees and Costs brought by the defendants; the defendants represented by their attorney of record, David G. Kontos; the plaintiffs represented by their attorney of record, John M. Keefe; the Court having heard statement of counsel, and considered the files and records herein [and no substantive response having been made to the fee application's hours or rate /s/ RHA] and being fully advised in the premises, now, therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED that defendants are awarded a judgment against the plaintiffs and/or their attorney of record, John Keefe, in the sum of $47,865.90;

DATED: October 22, 1999

/s/ Robert H. Alsdorf
JUDGE ROBERT H. ALSDORF

Presented by:

/s/ Steve Andrews #28307
David G. Kontos, WSBA#12710
Attorney for Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

THOMAS A. CACCIOLA and MARLENE CACCIOLA, husband and wife; and PETER VETRANO and LENA VETRANO, husband and wife, Plaintiffs, vs. SIMS COMMUNICATIONS, INC., a Delaware corp.; et al., Defendants.	**NO. 97-2-22252-4SEA** **ORDER GRANTING SUMMARY JUDGMENT** (Filed Aug. 27, 1999)

JUDGMENT SUMMARY

~~[1. Judgment Creditor: Sims Communication, Mel Leiner, Darren Marks and James J. Caprio~~

~~2. Judgment Debtor: Thomas A. Cacciola, Marlene Cacciola, Peter Vetrano, Lena Vetrano~~

~~3. Principal Judgment Amount: $~~

~~4. Interest to Date of Judgment: $~~

~~5. Costs: $~~

~~6. Attorney's fees $~~

~~7. Other recovery amount: $~~

~~8. Principal judgment shall bear interest at ___% per anum.~~

~~9. Attorney's fees shall bear interest at ___% per annum.~~

~~8. Judgment Creditor's Attorney: David G. Kontos~~

~~9. Judgment Debtor's Attorney: John Keefe~~ /s/ RHA]

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court on Defendant's Motion for Summary Judgment; the defendants, appearing through their attorney of record, David G. Kontos; the Plaintiff appearing through their attorney of record, John Keefe; the Court having read and considered the materials submitted in connection with the Motion, and having heard argument of counsel, now makes the following Order:

1. *Matters Considered:*

   a. Second Amended Complaint;

   b. Defendants Motion for Summary Judgment, including following Exhibits:

      (1) Plaintiff's Third Amended Complaint;
      (2) Settlement Agreement;
      (3) First Declaration of Melvin Leiner
      (4) Second Declaration of Melvin Leiner
      (5) Declaration of Michael Mallet
      (6) Declaration of Jonathan S. Robbins
      (7) Declaration of William T. Hart
      (8) Declaration of Christine Welch
      (9) Declaration to Steve Andrews
      Deposition testimony of Thomas Cacciola
      Deposition testimony of Peter Vetrano

   c. [Plaintiffs' Response, with 3 declarations; /s/ RHA]

d. [Defendants' Reply Thereto; /s/ RHA]

e. [Plaintiffs' Supplemental Response Thereto, with attached exhibits, /s/ RHA]

f. [___ /s/ RHA]

g. [___ /s/ RHA]

h. [___ /s/ RHA]

The above constitutes the entire record of matters considered by the Court in making its determination herein.

2. *Determination:* On the basis of the record set forth above and the argument of counsel, the court determines that no question of material fact remains as to the issues raised in plaintiff's Second Amended Complaint.

3. It is therefore, **ORDERED, ADJUDGED AND DECREED** as follows:

That the defendants be granted a Summary Judgment and that it is ruled as a matter of law that:

(a) Plaintiff's Complaint against all defendants should be dismissed with prejudice for failure to raise an issue of fact in support of their claims;

(b) Plaintiff's Complaint against Sims is dismissed with prejudice for lack of personal jurisdiction and improper venue;

~~(c) Defendants are awarded attorney's fees and costs in accordance with the terms of the Settlement Agreement~~. [Ruling is reserved on costs and fees. /s/ RHA]

~~(d) Attorney John Keefe is sanctioned under CR 11 for filing and pursuing a frivolous litigation with no basis in fact or law.~~ [Counsel's argument did not prevail, but were not frivolous; however, counsel is warned that of this case was to go further, he would be an essential witness, [illegible] have a conflict of interest, and would consider advising his clients to obtain separate counsel. /s/ RHA]

DATED: 8/27/99

/s/ Robert H. Ansdorf
Judge Robert H. Ansdorf

Presented by:

LAW OFFICE OF DAVID G. KONTOS

/s/ David G. Kontos
DAVID G. KONTOS WSBA #12710
Attorney for Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

THOMAS A. CACCIOLA, *et al.*, Plaintiffs, v. SIMS COMMUNICATIONS, INC., a Delaware corporation, *et al.*, Defendants.	No. 97-2-22252-4SEA ORDER [DENYING /s/ RHA] PLAINTIFFS' MOTION TO OBTAIN DEPOSITION RECORDINGS

The above-captioned matter came before the Court on plaintiffs' motion for an order to obtain the original deposition recordings for the depositions of Thomas Cacciola and Peter Vetrano taken on May 13, 1999, in Kent, Washington. Defendants were represented by their attorney of record, [D Kontos /s/ RHA], Melissa J. Watkins & Associates was represented by [pro se /s/ RHA], and plaintiffs were represented by their attorney of record John M. Keefe.

The Court considered the records and files in this action, and the following written submissions on the motion: (1) plaintiffs' motion to obtain original deposition recordings for plaintiffs' depositions; (2) [Kontos' opposition /s/ RHA]; (3) [Decl. of M. Watkins /s/ RHA]; and (4) [– /s/ RHA], and being fully advised,

It is Ordered that: (1) [~~Melissa J. Watkins & Associates shall provide~~ /s/ RHA] original deposition recordings for the depositions of Thomas Cacciola and Peter

Vetrano taken on May 13, 1999, in Kent, Washington ~~to plaintiffs' counsel within five (5) days of this order; (2) the original recordings for plaintiffs' depositions shall be provided to plaintiffs' counsel in a sealed envelope; (3) the original recordings for plaintiffs' depositions shall be returned to Melissa Watkins & Associates within five (5) days of their delivery to plaintiffs' counsel in a sealed envelope with an affidavit from a person or entity that professionally examines original tape recordings that the returned recordings are the original recordings for plaintiffs' depositions, and that the original recordings have not been altered, changed or tampered with in any way, and (4) plaintiffs shall have an additional twenty-one days from the date of this order to examine and make corrections to their depositions.~~ [need not be produced, no good cause having been shown for their production; /s/ RHA]

Dated: June 24, 1999

/s/ Robert H. Alsdorf
Judge Robert H. Alsdorf

Presented by:

/s/ John M. Keefe
John M. Keefe,
WSBA 18371
Attorney for Plaintiffs

Approved as to Form/for Entry; Notice of Presentation Waived

[Opposition filed /s/ RHA] WSBA no. ___
Attorney for Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

THOMAS A. CACCIOLA and MARLENE CACCIOLA, husband and wife; and PETER VETRANO and LENA VETRANO, husband and wife, Plaintiffs, vs. SIMS COMMUNICATIONS, INC., a Delaware corp.; et al., Defendants.	**NO. 97-2-22252-4KNT** **ORDER [DENYING /s/ RHA] SUMMARY JUDGMENT** (Filed Oct. 22, 1999)

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court on Defendant's Motion for Summary Judgment; the defendants, appearing through their attorney of record, David G. Kontos; the Plaintiff appearing through their attorney of record, John Keefe; the Court having read and considered the materials submitted in connection with the Motion, and having heard argument of counsel, now makes the following Order:

1. *Matters Considered:*

   a. Amended Complaint;
   b. Answer to Complaint;
   c. Defendants Motion for Summary Judgment and Memorandum of Lw in Support;

d. Declaration of Melvin Leiner in Support of Motion for Summary Judgment;
[e. Plaintiffs Opposition;
f. Defendants Reply;]
f. [Plaintiffs [illegible] /s/ RHA]
g. – /s/ RHA]
h. – /s/ RHA]

The above constitutes the entire record of matters considered by the Court in making its determination herein.

2. *Determination:* On the basis of the record set forth above and the argument of counsel, the court determines that [questions /s/ RHA] of material fact [remain /s/ RHA] as to the issues raised in plaintiff's Amended Complaint.

3. It is therefore, **ORDERED, ADJUDGED AND DECREED** as follows:

[~~That the defendants be granted a Summary Judgment and that it is ruled as a matter of law that:~~

~~(a) Plaintiff's Complaint against Sims is an improper venue and all claims against Sims Corporation should be dismissed;~~

~~(b) Plaintiff's Complaint against all defendants is dismissed with prejudice;~~]

[The Motion for Summary Judgment is **DENIED**. /s/ RHA]

DATED: 12/18/98

/s/ Robert H. Alsdorf
Robert H. Alsdorf

Presented by: /s/ David G. Kontos
DAVID G. KONTOS WSBA #12710
Attorney for Defendants

Hon. Robert H. Alsdorf

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

THOMAS A. CACCIOLA and MARLENE CACCIOLA husband and wife; PETER VETRANO and LENA VETRANO husband and wife, Plaintiffs, v. SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN M. MARKS and JANE DOE MARKS, individually and as a marital community; and JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community, Defendants.	No. 97-2-22252-4KNT ORDER CONTINUING HEARING ON THE SUMMARY JUDGMENT MOTION OF SIMS COMMUNICATIONS, INC.

This matter came before the Court on plaintiffs' motion for an order continuing the hearing date of

January 16, 1998, on SIMS Communications' motion for summary judgment. The Court considered the briefings [motion, opposition and reply /s/ RHA] and the pleadings and files in this action.

~~[Based on the briefings and evidence presented, the Court finds that plaintiffs cannot presently present by affidavit or declaration facts essential to SIMS Communications' motion for summary judgment until plaintiffs' discovery requests are complied with, and any motions to compel are ruled on.~~

~~Based on the above findings, it is Ordered:~~ /s/ RHA]

(1) Plaintiffs' motion is granted.

(2) The hearing on SIMS Communications' motion for summary judgment, currently set for January 16, 1998, is ~~continued until such time as plaintiffs' discovery requests and any motions to compel are ruled on.~~ [stricken. The motion may be re-noted after April 6, 1998. /s/ RHA]

Dated: January 09, 1998.

/s/ Robert H. Alsdorf
Judge Robert H. Alsdorf

Presented by:

/s/ John M. Keefe
John M. Keefe, WSBA 18371
Attorney for Plaintiffs

Approved as to Form/for Entry;
Notice of Presentation Waived

[Opposition filed /s/]
David G. Kontos, WSBA 12710
Attorney for Defendants

D-1

No. 70689-1

SUPREME COURT

OF THE STATE OF WASHINGTON

THOMAS CACCIOLA and MARLENE CACCIOLA,
and PETER VETRANO and LENA VETRANO,

Petitioners,

v.

SIMS COMMUNICATIONS, INC.,
a Delaware corporation, et al.,

Respondents.

MOTION FOR CLARIFICATION AND A STAY OF INTERLOCUTORY ORDERS (RULE OF APPELLATE PROCEDURE 8.3)

John M. Keefe, WSBA 18371
Attorney for Petitioners
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I. IDENTITY OF MOVING PARTY

Thomas Cacciola and Marlene Cacciola, and Peter Vetrano and Lena Vetrano, the petitioners, ask for the relief in Part II below.

II. STATEMENT OF RELIEF SOUGHT

The petitioners hereby respectfully move for a clarification and a stay of the March 26 and June 5, 2001, orders denying review and imposing sanctions, and denying their motion to modify ruling. The petitioners request a clarification of the orders that they may file their October brief on conditions designated by addendum to these orders. The petitioners also seek a stay of the March and June orders imposing sanctions as a condition to acceptance of the October brief on the payment thereof to respondents, and of the provisions imposing sanctions for seeking discretionary review, or in the alternative, a partial stay of the ruling imposing sanctions for

seeking discretionary review, pending a request for certiorari on federal constitutional grounds or until an appeal can be heard by this court on its merits.

III. FACTS RELEVANT TO MOTION

On November 18, 1999, an appeal was filed by the appellants and plaintiffs below from orders denying a motion for the recordings of plaintiffs' depositions, and granting the defendants' third motion for summary judgment and motion for attorney fees and costs. On December 21, 1999, the Court of Appeals, by letter, provided a schedule for the appeal with a notice that the designation of clerk's papers must be filed by December 3, 1999.

On January 21, 2000, the appellants' statement of arrangements was filed with the Court of Appeals. On January 25, the Court sent correspondence to the parties approving the appellants' request for filing of the statement of arrangements on January 21, and the designation of clerk's papers on January 31, 2000. On January 31, the appellants' designation of clerk's papers was sent by express mail to the clerk for preparation and transmittal to the Court of Appeals.

On March 8, 2000, an extension for filing the opening brief was sought by appellants because the clerk had not completed the clerk's papers for the appeal. On March 9, the clerk, in correspondence to the parties, granted the motion to April 28, 2000. The clerk's papers were completed on March 20. On May 9, a first extension for filing the opening brief was requested by the appellants. Appellant's counsel had obtained employment with the federal government, and more importantly, the respondents did

not make a designation of clerk's papers for the appeal. Supplemental designations of clerk's papers were thus necessary and filed by appellants' counsel on April 14 and June 14, 2000. The extension was granted to May 29, 2000. The supplemental designation of clerk's papers were completed by the clerk on May 1, and July 10, 2000.

On June 21, 2000, the appellants' opening brief was sent to the clerk for filing. The brief (71 pgs.) and a motion to file an over-length brief were received by the clerk on June 23, 2000. In correspondence dated July 6, 2000, the motion was denied, with a notation that the brief is due by July 17, 2000. The brief (50 pgs.) was re-filed on August 16, 2000, pursuant to correspondence from the clerk dated July 27, 2000.

On September 8, appellants filed a motion to file a supplemental brief on issues that address the October 22, 1999, order on the defendants' motion for attorney fees. The supplemental brief (7 pgs.) includes these issues (*i.e.*, lack of power to enter order and absence of findings as grounds for reversal of order). The respondents did not file a response to the motion. On September 13, the Court denied the motion because the combined briefing exceeds fifty pages. On October 10, 2000, appellants moved to modify the September 13 ruling, and with the motion, filed a fifty page brief with the issues in the supplemental brief conforming with the ruling under RAP 10.4(b). Respondents did not respond or object to the motion.

In this period (September and October), respondents filed two motions for extensions to file a response brief. On September 22, 2000, a motion by the respondents for an extension to October 22 to file a brief was filed. The

motion was granted on September 27, 2000. On October 19, 2000, a motion by the respondents for an extension to November 15, 2000, to file a brief, was also filed. On October 25, the motion was granted. The ruling provides that no further extensions will be granted without sanctions being imposed. On November 13, 2000, the respondents' brief was filed.

On November 16, 2000, the appellants' October 10 motion to modify ruling was denied. The ruling stated that the motion to modify ruling was not a motion to modify but was a motion to submit a substitute brief, that the brief raises an issue not presented in the original brief (whether appellants' counsel is liable for respondents' attorney fees in the October 22, 1999, judgment), and that the respondents have not had the opportunity to address the issue in their brief filed November 13, 2000. The ruling imposed sanctions on the appellants ($500), and conditionally granted the motion on the payment to respondents.

On December 15, 2000, appellants moved to modify the November 16 ruling requesting that the appellants October 10 brief be permitted in the absence of sanctions because the brief comes within the September 13 ruling on a fifty page brief under the requirements of RAP 10.4(b). More importantly, the respondents did not respond to the appellants' September and October motions to file the brief, and had more than two months (and more time than is allowed under the RAP 10.2), to address the issues in their brief filed on November 13, 2000. The December motion to modify the November ruling was denied on January 24, 2001. Correspondence with the order provides that it will become final unless a

motion for discretionary review is filed within thirty days from the date of the order.

On February 21, 2001, the appellants filed a motion for discretionary review with the Supreme Court. The motion initially observes that discretionary review of an interlocutory decision may be accepted under the criteria in RAP 13.5(b), and that review may be expanded to all issues ruled upon by the trial court. *Amend v. Bell*, 89 Wn.2d 124, 127, 570 P.2d 138 (1977). The motion also prefaces established state law that the rules are to be liberally interpreted to promote justice and facilitate the decision of a case on the merits. RAP 1.2(a); *State v. Lewis*, 93 Wn.2d 80, 83, 605 P.2d 1265 (1980).

The appellants' motion, of course, is of record, and the basis of the motion will not be re-hashed in the present motion, except to additionally state that the motion restates the appellants' arguments in motion, filings below, and argues that the rulings imposing sanctions against the appellants for a brief that conforms with earlier rulings and the rules of appellate procedure, and where the respondents had more than two months (and more time than is allowed under RAP 10.2) to address the issues in their response brief filed on November 13, 2000, infringe due process and burden protected expression in the absence of an abuse by the appellants of these rights in this case. (citing *Richards v. Jefferson County*, 517 U.S. 793, 797, 804 (1996) ("extreme application[s] of state law . . . violate the Federal Constitution"); *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984) ("Prior restraints on speech . . . are governed by Art. I, Sec. 5 of the Washington Constitution . . . : Freedom of Speech. Every person

may freely speak, write and publish on all subjects, being responsible for the abuse of that right")).

The respondents did not file a response to the motion. On March 26, 2001, a ruling on the petitioners' motion held that the motion for discretionary review, which in essence requests that the Supreme Court accept review of this case, was filed for the purpose of delay and awarded sanctions of $500 against the petitioners' counsel, payable to the Supreme Court, pursuant to RAP 18.9(a). Unlike the January 2001 order, the March 26 ruling does not express or indicate that the appellants' October brief may be filed with or pursuant to monetary conditions provided in the order.

On April 6, 2001, the petitioners obtained a supersedeas/appeals bond staying enforcement of the October 1999 judgment against them. The bond was secured for $75,000 by prior order of court, and has been posted with the respondents' counsel.

On April 24, 2001, the petitioners filed a motion to modify the March ruling with the Supreme Court. The motion to modify ruling expanded arguments on the prior restraint doctrine with citations to *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), *State v. Basset*, 128 Wn.2d 612, 911 P.2d 385 (1996), *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994), and *Furfaro v. City of Seattle*, 97 Wn. App. 537, 984 P.2d 1055 (1999), *review granted*, 140 Wn.2d 1012 (2000), and in essence argued that the rulings at issue are in conflict with these cases. The basis of the argument is that the rulings are broader than necessary to protect the right to a fair appeal, that the rulings effectively and unfairly

discourage speech that is not in violation of any rules and that is constitutionally protected, and that the remedy for any abuse by the appellants of the exercise of these rights, (*i.e.*, submitting a brief by motion in October 2000 that conforms with an earlier appellate ruling and the rules appellate procedure), is more narrowly punishable by post publication sanctions if the respondents can show (which they have yet to do) that the appellants' briefings on issues that affect the October 1999 judgment (lack of power to enter order and absence of findings as grounds for reversal of order) are without legal foundation in the record in this case. (Motion to Modify Ruling, pgs. 16-18).

The motion to modify ruling also augmented due process arguments, citing *Brinkerhoff-Faris Co. v. Hill*, 281 U.S 673 (1930), and moreover argued that the rulings at issue implicate equal protection principles in the circumstances of this case that are in conflict with RAP 1.2(a), *State v. Lewis*, 93 Wn.2d 80, 605 P.2d 1265 (1980), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (Motion to Modify Ruling, pgs. 18-20.).

The basis of the equal protection argument is that the treatment being accorded to the petitioners is arbitrary. The March 2001 ruling, for example, states that the motion for discretionary review, which clearly requests that the Supreme Court accept review of this case, was filed for the purpose of delay and awarded sanctions payable to the Supreme Court pursuant to RAP 18.9(a). How can a motion which seeks review by a state's highest court of all issues in the case, such as petitioner's motion, be classified as having been filed for the purpose of delay, when the motion seeks accelerated review by the Supreme Court, and when the case will ultimately be

appealed on a petition for review which is a longer process? The March 2001 ruling also randomly references extensions sought by the petitioners in the appeal (which were also requested by respondents) prior to filing of the opening brief, as a basis for splintering the motion and substantiating sanctions in the appeal. The extensions were granted where the record had not been completed by the clerk for the appeal, where respondents did not make a designation of clerk's papers and supplemental designation of clerk's papers were necessary and filed by the appellants, and where the respondents also sought extensions (one involving a vacation by respondents' counsel in Hawaii) which were granted by clerk notations as the record shows.

More prominently, the March and January 2001 rulings have imposed sanctions against the appellants, payable to respondents (for what amounts to putting the petitioners' counsel's name on a judgment when there was no basis for this liability), as a condition to the filing of a brief in October that conforms with earlier rulings and the rules of appellate procedure, and in circumstances where the respondents had more than two months (and more time than is allowed under RAP 10.2) to address the issues in their response brief when it was filed in November. The motion emphasized that briefs by parties to an appeal subsequent to filing of their briefs (*i.e.*, supplemental briefs) are routinely allowed (without sanctions) to promote and facilitate the decision of a case on the merits. RAP 1.2(a). Moreover, included by petitioners with the motion (Appendix A) are examples of orders on motions for supplemental briefs. (Motion to Modify Ruling, pgs. 18-20).

The equal protection argument is that the rulings at issue convert similarly situated claims into dissimilarly situated claims with these distinctions in the rulings as the basis for unequal and inequitable classifications. "This . . . is the very essence of arbitrary state action. The Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out . . . and that rationality is absent here." *Logan*, 455 U.S., at 441-42. (italics in original omitted).

The respondents did not file a response to the motion. On June 5, 2001, the Supreme Court denied the petitioners' April 24, 2001, motion to modify the March 26 ruling.

IV. GROUNDS FOR RELIEF

The primary authority for the petitioners' motion requesting a clarification and a stay of the March 26, 2001, ruling and the June 5, 2001, order is RAP 8.3, which provides:

> Rule 8.3 Appellate Court Orders Need For Effective Review. Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A party seeking the relief provided by this rule should use the motion procedure provided in Title 17.

The rule gives "the appellate court broad discretionary authority to issue orders to insure effective and equitable review. The rule may be used to seek to delay the enforcement of judgments not subject to supersedeas as a matter of right." RAP 8.3, Task Force Comment.

A) *Clarification of March Ruling and June 2001 Order*

The petitioners initially request a clarification of the March 26 ruling and June 5, 2001 order that, as the appellants below, they may file their brief of October 2000, with the Court of Appeals on conditions designated by addendum to these orders. Unlike the January 24, 2001 order, the March 26 ruling and June 5, 2001 order do not express that the appellants' October brief may even be filed or that the brief may be filed under or pursuant to monetary conditions provided in the order.

Correspondence with the January 2001 order provides that it will become final unless a motion for discretionary review pursuant to RAP 13.5(a) is filed within thirty days of the order. Does the order become final upon the denial of a motion for discretionary review, the denial of a motion to modify ruling on the motion, the denial or grant of a motion such as has been brought by the petitioners in this case, or upon the denial or grant of certiorari accompanied by an affirmance or a reversal of the decision(s) under consideration. Under RAP 12.5(a), no mandate issues for an interlocutory decision of the appellate court, and thus, RAP 12.7 (Stays of Mandate Pending Decision on Application for Review by United States Supreme Court) is by its terms inapplicable.

This is why a clarification of the March ruling and June 2001 order is necessary. Any confusion arising from the orders can be avoided by a clarification that petitioners may file their brief of October 2000, with the Court of Appeals on conditions (monetary or otherwise) designated by addendum to these orders.

B) *Stay of March Ruling and June 2001 Order*

A stay is sought by petitioners of the March ruling imposing sanctions as a condition to acceptance of the October 2000 brief on the payment thereof to respondents, and of the provisions imposing sanctions pursuant to RAP 18.9(a) for seeking discretionary review by the Supreme Court, or in the alternative, a partial stay of the ruling imposing sanctions for seeking review, pending a request for certiorari on federal grounds, or more optimally, until the appeal can be heard by this Court on its merits. *See Kennett v. Levine*, 49 Wn.2d 605, 608, 304 P.2d 682 (1956) (concluding that this court may require that the litigants' *status quo* be maintained until the appeal can be heard on its merits before this court.).

The June 2001 order denied the petitioners' motion to modify ruling, but did not impose sanctions. This Court may review the issues presented in this motion, and may grant a stay or a partial stay as requested by petitioners without offending issue preclusion and law of the case principles. *See United States v. Deaconness Med. Ctr.*, 140 Wn.2d 104, 110-11, 994 P.2d 830 (2000) (issue preclusion not applied); *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988) (law of the case doctrine is discretionary, and does not prevent court from overruling

a previous erroneous decision and justice would best be served by review of the decision); *Small Business Co. v. Intercapital Corp.*, 108 Wn.2d 324, 333, 738 P.2d 263 (1987) (law of the case doctrine not applied); *Greene v. Rothschild*, 68 Wn.2d 1, 6-10, 402 P.2d 356 (1965) (law of the case doctrine not applied). A final judgment on the merits has not been issued, and even if issue preclusion applied, its application would work an injustice as explained above (pgs. 4-8). Also, to the extent the "law of the case" even applies, the March ruling is erroneous (pgs. 6-8), and justice would best be served by review of the ruling.

An appellate court may grant a stay pursuant to RAP 8.3 pending the outcome of an appeal upon a showing that the issues on review present debatable questions, and the equities require that the status quo be maintained in order to preserve the fruits of the appeal in the event it should be successful. *Levine*, 49 Wn.2d, at 606-08; *Shamley v. Olympia*, 47 Wn.2d 124, 126-27, 286 P.2d 702 (1955); *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986), *aff'd in part and rev'd in part*, 108 Wn.2d 38, 738 P.2d 665 (1987).

This is an ancillary proceeding, and the merits of this case are not before the Court. *Levine*, 49 Wn.2d, at 607. At this point, however, it should be painfully evident that the issues on review are debatable. Minimally, the issues are problematic and arguable, and legally and objectively, should be decided in petitioners' favor. The record establishes that the Court of Appeals sanctioned petitioners for their October 2000 brief and conditioned the acceptance of the October brief on the payment of the sanctions to respondents. (*see* pgs. 2-4, above). More remarkably, sanctions were imposed against the appellants, payable to

respondents (for what amounts to putting the petitioners' counsel's name on a judgment when there was no basis for this liability), as a condition to the filing of a brief in October that conforms with earlier rulings and the rules of appellant procedure, and in circumstances where the respondents were granted two extensions and had more than two months (and more time than is allowed under RAP 10.2) to address the issues in their response brief when it was filed in November.

In March 2001, a motion for discretionary review pursuant to RAP 13.5(b) was filed by petitioners. The motion is primarily based on these facts, and even in the absence of arguments on infringements of due process, equal protection, and restraints on speech in the absence of an abuse by the appellants of these rights in this case (*see* pgs. 4-8), from these facts, it is collectively arguable, and certainly debatable, that probable error was committed in the January decision imposing sanctions as a condition to acceptance of the October brief. The decision substantially alters the *status quo* because the October motion to modify ruling with a 50 page brief (and the issues in the supplemental brief filed a month earlier) *conforms* with the Court of Appeals' September 13 ruling under RAP 10.4(b) and the rules of appellate procedure, and equally important, the decision substantially limits the freedom of the appellants to act because the Court of Appeals will not accept the brief except upon payment of sanctions to respondents. Also, as mentioned above, aside from the fact that the respondents did not respond or object to the appellants' September and October motions to file the brief, in this period, respondents were granted two extensions to file a response brief and had

more than two months (and more time than is allowed under RAP 10.2) to address the issue in their brief when it was filed in November.

The requirements for review under RAP 13.5(b) are debatably satisfied because the appellants are being sanctioned for conduct that is not in violation of any rules. This is why issues of due process, equal protection, and restraints on speech in the absence of an abuse by the appellants of these rights in this case are present. These issues are briefed in the March motion for discretionary review and more expansively in the April motion to modify ruling. The motion to modify ruling also highlights that supplemental briefs are routinely allowed without sanctions to promote and facilitate the decision of a case on the merits (RAP 1.2), and with the motion are examples of orders on motions granting supplemental briefs. (MModify Ruling, pg. 19).

The March 26, 2001 ruling compounds the errors of the January 2001 order. The ruling arbitrarily states that the petitioners' motion for discretionary review, which clearly requests that the Supreme Court accept review of this case, was filed for the purpose of delay and awarded sanctions against the petitioners' counsel, payable to the Supreme Court, pursuant to RAP 18.9(a). The motion for discretionary review, however, quite clearly sought accelerated by the Supreme Court of all issues in this case. The ruling also unjustly (and erroneously) references approved extensions sought by appellants (which were also requested by respondents) prior to filing of the opening brief, as a basis for denying the motion and imposing further sanctions in the appeal. The extensions were granted where the record had not been completed by the

clerk for the appeal, where respondents did not make a designation of clerk's papers and supplemental designations of clerk's papers were necessary and filed by the appellants, and where the respondents also sought extensions (which the March ruling overlooks) that were granted by clerk notations as the record shows.

The March ruling uses these distinctions as a basis for adopting and imposing sanctions against the petitioners for filing a brief in October that conforms with an earlier ruling and the rules of appellate procedure, and as previously mentioned, under circumstances where the respondents had more than two months, and more time than is allowed under the rules of appellate procedure (RAP 10.2) to address the issue in their brief when it was filed in November. The ruling is erroneous, and works as a manifest injustice to the petitioners. *See Small Business Co.*, 108 Wn.2d, at 333.

If there is a basis for the sanctions that are being imposed upon the petitioners, it is not apparent in the record. It is incredible that petitioners should have to pay the respondents for briefing issues on what amounts to putting their counsel's name on a judgment when there was no basis for this liability. The respondents have yet to respond to the legal argument on these issues (which are brief, and take up all of 4 pages in the appellants' October brief), and the question that naturally arises is how it can be determined that the petitioners' arguments on these issues are unmeritorious and without legal foundation, when they have yet to respond to these issues, and to the more serious issue just stated. It is for this added reason that the October and December motions should have been granted without sanctions.

Before the Supreme Court, petitioners are asserting constitutional arguments on these issues. The arguments are that the January and March 2001 rulings infringe due process and equal protection as extreme and arbitrary applications of state law (*see, e.g., Richards,* 517 U.S., at 804 (a "chose in action" is a protected property interest, and affirming due process principles that extreme applications of state-law res judicata principles violate the Federal Constitution); *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430 (1994) ("When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process"); *Logan,* 455 U.S., at 441-42 (Under the Equal Protection Clause, "This Court . . . has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded . . . is arbitrary"); *Brinkeroff-Faris,* 281 U.S., at 675-79 (1930) (reversing dismissal of a state court action on due process grounds in a state court holding that the plaintiff had adequate remedies which it did not pursue (when none were available), and which held that the plaintiff "was clearly guilty of laches in not so doing")).

The March and January 2001 rulings are debatably in conflict with the principles in these cases. The basis of the argument is that the appeal in the present case is a property interest protected by due process and equal protection principles, that state law is being applied in an extreme and arbitrary manner so as to preclude petitioners' October brief except upon the payment of sanctions to the respondents for a the [sic] brief filed in

conformance with earlier rulings and the rules of appellate procedure (RAP 10.4(b)) and under circumstances where respondents had more time than is allowed under the rules of appeal (RAP 10.2) to respond to the issues, that the absent procedures in the appeal are the rules of appellate procedure, and that proper application of the rules precludes the assessment of sanctions that were imposed against the petitioners for filing the October brief and the February motion for discretionary review.

The March and January 2001 rulings have arbitrarily and erroneously imposed sanctions against the petitioners in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The adjudications have converted similarly situated claims (*i.e.*, a properly filed brief and a properly filed motion for discretionary review) into dissimilarly situated claims with arbitrary distinctions in the rulings as a basis for unequal and inequitable classifications. "This . . . is the very essence of arbitrary state action. The Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out . . . and that rationality is absent here." *Logan*, 455 U.S., at 441-42.

The March and January 2001 rulings are also in conflict with the prior restraint doctrine. They are broader than necessary to protect the right to a fair appeal, and the rulings have a chilling effect that effectively and unfairly discourages speech that is not in violation of any rules and that is constitutionally protected. It is certainly debatable that the remedy for any abuse by the appellants of the exercise of these rights is more narrowly punishable by post publication sanctions. *See Basset*, 128 Wn.2d 612, at 615-18; *Furfaro*, 97 Wn. App. at 548-50. The

petitioners' submission of a brief by motion in October 2000 clearly conforms with earlier rulings and the rules appellate procedure. Also convincing, is the fact that when the respondents filed their brief, they had more than two months, and more time than is allowed under the rules of appellate procedure (RAP 10.2), to address the issues in their brief when it was filed in November. Post publication sanctions are appropriate in this case. All the respondents have to do, is to respond to the issues (which they have yet to do) and show that petitioners' briefings on issues that affect the October 1999 judgment (lack of power to enter order and absence of findings as grounds for reversal of order) are without legal foundation in the record. The petitioners submit that these issues should be decided in their favor, and that respondents cannot make this showing in this case.

The petitioners' arguments on infringements of due process, equal protection, and restraints on speech arising from the March ruling and June 2001 order are arguable and debatable, and legally, these issues should be decided in petitioners' favor.

In April 2000, as previously mentioned, the petitioners obtained a supersedeas bond staying enforcement of the October 1999 judgment against them. The bond was secured for $75,000 by prior order of court, and has been posted with the respondents' counsel. Petitioners' counsel is not covered by the bond, but will be (or should be) covered under bond provisions by July, and therefore, pursuant to RAP 8.3, this Court may order a stay of the March and January 2001 rulings imposing sanctions against petitioners' counsel for filing the October brief and the motion for discretionary review conditioned

upon coverage obtained by petitioners' counsel under the existing bond or a separate bond pending disposition of a request for certiorari, or more optimally, until the appeal can be heard by this Court on its merits. RAP 8.3; *Levine*, 49 Wn.2d, at 606-08.

Alternatively, a stay without a bond pending a request for certiorari or until the appeal can be heard by this Court on its merits may also be ordered as a means of providing equitable and effective review, since the rule may be used to seek to delay the enforcement of judgments not subject to supersedeas as a matter of right. RAP 8.3, Task Force Comment. The latter alternative is equitable and preferable. Surely, this Court can wait until a disposition of this case on its merits before the petitioners' counsel's payment of the sanctions imposed for filing the motion for discretionary review. This also applies to a stay of the sanctions imposed for the October brief payable to respondents' counsel. The sanctions imposed by the rulings will definitively be affirmed or reversed on the disposition of the petitioners' request for certiorari in the near future.

Unless a clarification of the March and June 2001 orders or a stay of the orders as requested by petitioners is granted, the March ruling, which is enormously prejudicial to the petitioners and the merits of the appeal, will remain in place. The ruling, as previously noted, is erroneous and works as a manifest injustice to the petitioners and the appeal, which has yet to be decided on its merits. In the absence of a clarification or a stay of these orders, petitioners will be wrongfully deprived of the right to file their October brief, except upon the payment of sanctions to the respondents or worse, will not be able to file the

brief at all. In either case, the subject matter of the appeal will be partially destroyed by orders that unconstitutionally operate as deprivations of due process, equal protection, and restraints on speech in the absence of an abuse by the petitioners of these rights.

The prerogative of petitioners to file the October brief in the absence of penalties, monetary or otherwise, is a right because the brief conforms with earlier rulings and the rules of appellate procedure. This right is etched in concrete because respondents had more than two months notice of the petitioners' brief and more time than is allowed under the rules of appellate procedure when the brief was again filed in October to respond to the issues in their November brief.

V. CONCLUSION

For the foregoing reasons, the petitioners ask that the Supreme Court grant their motion for a clarification of the March 26 and June 5, 2001, orders that they may file their October brief on conditions designated by addendum to these orders. Petitioners also ask that their request for a stay of the orders imposing sanctions against petitioners for seeking discretionary review be granted pending a disposition of their request for certiorari or until an appeal can be heard by this court on its merits, and that the provisions of the March 2001 ruling

imposing sanctions as a condition to acceptance of the October brief be included in the stay.

Dated: June 24, 2001.

Respectfully submitted,

/s/ John M. Keefe
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